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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1941

No. 617

VERNON J. BROWN, THEODORE I. FRY, HARRY F. KELLY, and LOUIS M. NIMS, comprising the MICHIGAN STATE BOARD OF TAX ADMINISTRATION, and VERNON J. BROWN, as Auditor General of the State of Michigan, THEODORE I. FRY, as State Treasurer of Michigan, HARRY F. KELLY, as Secretary of State for Michigan, and LOUIS M. NIMS, as Managing Director of said STATE BOARD OF TAX ADMINISTRATION,
Petitioners,
v.
J. B. SIMPSON, INC., an Illinois corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners herein [comprising the Michigan State Board of Tax Administration charged with enforcement and administration of the Michigan 'Sales Tax Act' and 'Use Tax Act'] pray that a writ of certiorari issue to review a decree of the Supreme Court of the State of Michigan, entered on the 13th day of August, A. D. 1941, in a certain cause wherein the J. B. Simpson, Inc., an Illinois corporation [licensed as a foreign corporation

to do business in the state of Michigan], was plaintiff and appellee, as well as cross-appellant, and petitioners' predecessors in office were named as defendants, appellants and cross-appellees, modifying and affirming a decree of the circuit court for the county of Wayne [Michigan], in chancery, dated January 9, 1940, and by their counsel petitioners respectfully show:

I

Record References

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Michigan [10 copies, Rule 38 (7)], with pages numbered 1 to 63, inclusive, and an additional record showing subsequent proceedings, printed with pages numbered 64 to 86, inclusive, and containing [1st] the opinion of the court and the opinion of the dissenting justices, [2nd] the decree of the court, entered August 13, 1941, and [3rd] an order of the court staying proceedings pending outcome of these proceedings, all as certified to this Court.

We also attach to this petition the following appendixes:

Appendix 'A', true copies of the statutes involved, *viz.:*

(1) the Michigan 'Sales Tax Act' [Act No. 167, Michigan Pub. Acts 1933, as amended,

(2) the Michigan 'Use Tax Act' [Act No. 94, Michigan Pub. Acts 1937 (the statute in controversy), and

(3) Act No. 327, § 94, Michigan Pub. Acts 1931, being a section of the Michigan 'General Corporation Act' (Michigan Stat. Ann., § 21.95).

Appendix 'B', the opinion of the Michigan Supreme Court rendering in companion causes, sustaining the constitutional validity of the Michigan 'Use Tax Act', and handed down contemporaneously with the opinion in the case of J. B. Simpson, Inc. [*Banner Laundering Co., et al, v. State Board of Tax Administration*].

II

Opinions of the Court Below

The foregoing opinions of the Michigan Supreme Court are officially reported as follows:

(a) the opinion in an earlier case, involving the Michigan 'Sales Tax Act', and upon which the lower court relied:

J. B. Simpson, Inc., v. O'Hara (1936), 277 Mich. 55 (also appears in the record, pp. 35-41, inclusive),

(b) the opinion, and the dissenting opinion, in the cause at bar, involving the Michigan 'Use Tax Act':

J. B. Simpson, Inc., v. State Board of Tax Administration (1941), 297 Mich. [Adv. sheets] 403; 298 N.W. [Adv. sheets] 81; and

(c) the opinion filed in the companion case, sustaining the Michigan 'Use Tax Act' as constitutional:

Banner Laundering Co., et al, v. State Board of Tax Administration [1941], 297 Mich. [Adv. sheets] 419; 298 N.W. [Adv. sheets] 73.

III

Summary Statement of the Matter Involved

We seek review of a decree of the Supreme Court of the State of Michigan (R 82) holding that, for the reasons set forth in its opinion (R 66), the Michigan 'Use Tax Act' imposes no duty or tax upon the respondent J. B. Simpson, Inc., an Illinois corporation.

That statute is said to complement the Michigan 'Sales Tax Act' by compensating the State for loss of revenues sustained because of lack of power to compute the sales tax upon interstate transactions,

J. B. Simpson, Inc., v. O'Hara [1936], 277 Mich. 55.

Outline of 'Sales Tax Act'

The Michigan 'Sales Tax Act' levies upon 'all persons engaged in the business of making sales at retail' an annual tax for the privilege of engaging therein, equal to three [3] per cent of the gross proceeds thereof [§ 2], computed and paid monthly on the basis of returns made by the taxpayer [§ 6].

> "The term 'sale at retail' means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use other than for consumption or use in industrial processing or agricultural produc-

ing, or for any other purpose than for resale in the form of tangible personal property . . . .'' [§ 1 (b)].

''The term 'gross proceeds' means the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, . . .'' [§ 1 (g)].

All persons engaged in any business for which a privilege tax is imposed by the act are required to register with the authority created to enforce the act [§ 21], the state board of tax administration [§ 3], but such a taxpayer may reimburse himself by adding the tax to his sale price [§ 23].

Upon consideration of this act, the Supreme Court of the State of Michigan, in the earlier case heretofore cited,

J. B. Simpson, Inc., v. O'Hara [1936], 277 Mich. 55,

held that in plaintiff's transactions involving orders taken in Michigan subject to acceptance in Illinois, ownership of the property was transferred in the latter state upon delivery to an interstate carrier and, being interstate within the meaning of the commerce clause of the Federal Constitution, were not, nor could they be subject to the Michigan sales tax.

Outline of 'Use Tax Act'

The Michigan 'Use Tax Act' levies upon 'every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state, . . . which shall be equal to three [3] per cent of the price of such property' [§ 3].

It provides that the tax shall not apply to certain enumerated transactions, including

"(a) property the sale of which in this state has been subjected to the tax imposed by . . [the 'Sales Tax Act']. . .

(f) property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this act under the law of any other state of the United States: . . . ." [§ 4].

Section 5 of the act imposes upon sellers of tangible personal property certain duties in respect of the collection of the tax from the consumer or user thereof:—

"Sec. 5. Every seller of tangible personal property for storage, use or other consumption in this state, *engaged in the business of selling at retail in this state*, shall, within thirty [30] days after the effective date of this act, register with the board and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices, or other place of business in this state and such other information as the board [state board of tax administration] may require with respect to the enforcement of this act: *Provided*, That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of act number one hundred sixty-seven [167] of the public acts of nineteen thirty-three [1933] as amended [the 'Sales Tax Act'], to register with the board as provided in this act. Every such seller shall collect the tax imposed by this act from the consumer and the board may, by rule or regulation, authorize any other seller to collect such tax from the consumer, and such rule or regulation shall require that each such seller shall register with the board in such form as may be therein provided" [The phrase italicize d underscores plaintiff's claims, and was firmly stressed by the Michigan Supreme Court].

The act further provides that 'in case any seller who is required or authorized to collect the tax fails to do so,

he shall be liable personally for such amount as he failed to collect' [§ 9].

The term 'seller' is defined by the statute to mean

> "the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use, or other consumption in this state; and when, in the opinion of the board, it is necessary for the efficient administration of this act to regard any salesman, representative, peddler or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates or from whom he obtains tangible personal property, sold by him for storage, use or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, and board may so regard him and may regard such dealer, distributor, supervisor, or employer as the 'seller' for the purpose of this act" [§2 (d)].

And 'business' is defined to mean 'all activities engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect' [§ 2 (h)].

The Facts

The facts are undisputed, it having been stipulated that they are found and set forth in the opinion of the Michigan Supreme Court,—*J. B. Simpson, Inc. v. O'Hara* [1936], 277 Mich. 55 (R 35-41).

As briefly stated by Mr. Justice Wiest, who wrote the controlling opinion in the case,

> "plaintiff operates a merchant tailoring establishment in Chicago, Illinois, takes order in this state,

from residents, for clothes, fills such orders in Chicago and, upon delivery there to an interstate carrier, title thereto is vested, by agreement, in the purchaser" (R 66).

The following additional facts, correctly summarized by Mr. Justice Boyles in his dissenting opinion, should also be considered:

> "Plaintiff is an Illinois corporation selling men's tailoring apparel in Michigan, mantains a branch office in Detroit where samples are kept and sometimes displayed, operations of salesmen are supervised, an office staff maintained, bushelmen are employed to make alterations, collections of unpaid balances are made and deposited in a Detroit bank subject only to withdrawals by Illinois checks. At plaintiff's branch office in Detroit samples of cloth and sample suits are exhibited, salesmen take measurements and orders and accept down-payments. Plaintiff there has a telephone listing and address as 'SIMPSON J B INC tlrs' and an advertisement under the same name in the telephone book. Orders for goods are solicited in Michigan, received by the Detroit branch, and forwarded to Chicago, subject to acceptance in Illinois. No credit is extended, balance of the purchase price is collected from customers upon delivery. Plaintiff has been authorized to do a tailoring business in Michigan as a foreign corporation, and is paying its fees as a foreign corporation for the privilege of engaging in business in Michigan" (R 72).

Plaintiff filed in the cause at bar, in the trial court, a bill of complaint against the Michigan state board of tax administration and others for a declaratory judgment regarding the rights of plaintiff under the Michigan 'Use Tax Act' and for injunctive relief, alleging [among other things] that its business

"is such that it is not and may not be charged with any duty or obligation in respect to said Use Tax Law or use tax; plaintiff is not and may not be required to register thereunder, to file any returns thereunder, to collect any sums from its customers on account thereof. . . . . The State of Michigan and the legislature of the State of Michigan have no power, authority or jurisdiction to impose any such duties or obligations upon plaintiff. No such duties or obligations are imposed upon plaintiff by the terms of said act, but if they were, then the property sold by plaintiff to Michigan customers would be exempt . . . . under the act" (R 11, 12).

It further alleged that if the use tax act should be construed to impose duties or obligations upon plaintiff,

"Then it contravenes and is repugnant to the Constitution of the United States, and by way of illustration . . . . . (c) it imposes a direct burden upon, and a regulation of, commerce of the several States, contrary to the provisions of Article 1, sections 7 and 8 of the Constitution of the United States" (R 12).

The plaintiff prayed that the court might

"find, declare and decree that plaintiff is not subject to the provisions of said Act 94 [the 'Use Tax Act'] and may not be made subject thereto; that plaintiff, its officers, directors, agents and employees are not obliged or required to comply with the said Act or the provisions thereof; that the business transacted by plaintiff is not such as subjects plaintiff, its officers, directors, agents and employees to any obligations or duties in respect of said act; that said act is not a valid exercise of the taxing power of the State of Michigan and is unconstitutional, null and void if construed and applied to plaintiff, the property sold by plaintiff, or the business transacted by plaintiff" (R 15, 16).

Companion Cases

Contemporaneously therewith, companion bills of complaint were filed, by the same counsel, in behalf of others affected by the use tax, for declaratory judgments of unconstitutionality of the Michigan 'Use Tax Act' and for injunctive relief alleging, among other averments, that the statute in question transgresses the commerce clause of the Federal Constitution (Article 1, § 8). In all, approximately 29 of these actions were thus instituted, but three [3] typical cases were appealed to the Supreme Court of the State of Michigan [*Banner Laundering Co. v. State Board of Tax Administration; Ford Building Co. v. Same; Sills v. Same*, 297 Mich. 419; 298 N.W. 73].

Trial Court's Decision & Decrees

All of the 'Use Tax Cases', including the cause at bar, were simultaneously submitted to the trial court under a 'Stipulation of Facts' (R 26), and an opinion was filed by the trial jurist, covering all cases before him (R 41-52).

In the cases of the *Banner Laundering Company* and other users or consumers of personal property subject to the use tax, as well as in the case at bar [the *J. B. Simpson, Inc. Case*], the court held and later decreed that the 'Use Tax Act' of Michigan was valid as against the objections raised by the several plaintiffs, including that based upon the commerce clause of the Federal Constitution (R 48, 49).

Concerning the cause at bar, the trial court said:

> "This brings us to the condition which this act imposes upon plaintiff J. B. Simpson, Inc. This plaintiff has already been before this court with respect to the application of the Sales Tax Act as to its

business in the State of Michigan, and our Supreme Court, in the case of *J. B. Simpson, Inc., vs. O'Hara*, 277 Mich. 55, held that the plaintiff was not subject to the sales tax, and also held in that case because the work was done in Illinois and the orders accepted in that state, that the title to the clothing passed to the purchaser in the state of Illinois when the delivery was made to the carrier at Chicago, and therefore such a sale was not made in Michigan, but in Illinois, and being interstate commerce, could not be taxed by the State of Michigan.

Conditions imposed by this record have not changed from the matters and things set forth in *Simpson v. O'Hara, supra*, therefore in view of that decision, I find that this act does not impose any duty or tax upon such plaintiff".

A decree was entered in conformity with the foregoing opinion (R 56-60).

Appeals to Supreme Court

The state board of tax administration claimed and perfected an appeal from this decree, to the Supreme Court of the State of Michigan (R 60), assigning as error that (1) the court erred in holding that Act 94, Public Acts of 1937 [the 'Use Tax Act'] does not impose any duty or tax upon J. B. Simpson, Inc., and (2) the court erred in holding that J. B. Simpson, Inc., was and is conducting business in interstate commerce and was not and is not engaged in the business of selling tangible personal property at retail in Michigan (R 1).

Plaintiff J. B. Simpson, Inc., filed claim of cross-appeal (60), averring that the trial court erred, among other things,

"3. In failing and refusing to find and adjudge that said Act 94 of the Public Acts of 1937, as amend-

ed [the 'Use Tax Act'], contravenes and is repugnant to

(c) Article 1, Section 8, of the Constitution of the United States" (R 2).

In the cases of *Banner Laundering Co., et al,* the Michigan Supreme Court affirmed the lower court's decree, and held that, as against any of the reasons urged by appellants, the act is constitutional. And that, so far as concerned objections based upon the commerce clause of the Federal Constitution, such objections were foreclosed by several recent decisions of this Court, among those cited being

Henneford v. Silas Mason Co., 300 U.S. 577
Felt & Tarrant Co. v. Gallagher, 306 U.S. 62.

In the Case of *J. B. Simpson, Inc.* [the cause at bar], the Supreme Court affirmed the circuit court decree and modified that order by declaring that it found 'no occasion to touch upon the constitutionality of the act, and as there was none necessary in the circuit court, so much of the decree below as deals with constitutionality of the act is eliminated, and the question left without decision to await a proper setting' [R 69]. Notwithstanding this statement, however, it is our position that the court's decision, taken as a whole, was largely controlled by constitutional principles and, in effect, held that the Michigan 'Use Tax Act', as construed by the court, and applied to J. B. Simpson, Inc., transgressed the commerce clause of the Constitution of the United States [Article 1, § 8].